Aff

Field

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~387.~~ 124

THE UNITED STATES, APPELLANT,

vs.

DOMINGA G. DE ATHERTON, EXECUTRIX, AND A. B. GROGAN, EXECUTOR OF FAXON D. ATHERTON, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED FEBRUARY 14, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 387.

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Subpœna.

UNITED STATES OF AMERICA:

Circuit court of the United States, ninth circuit, district of California.
In equity.

The President of the United States of America, greeting:

To Faxon D. Atherton:

You are hereby commanded that you be and appear in said circuit court of the United States aforesaid, at the court-room in San Francisco, on the 7th day of May, A. D. 1877, to answer a bill of complaint exhibited against you in said court by the United States of America, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty of five thousand dollars.

2 Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 13th day of April, in the year of our Lord one thousand eight hundred and seventy-seven, and of our Independence the 101st.

[SEAL.] L. S. B. SAWYER, *Clerk.*

Memorandum pursuant to rule 12, Supreme Court U. S.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of May next, at the clerk's office of said court, pursuant to said bill, otherwise the said bill will be taken pro confesso.

L. S. B. SAWYER, *Clerk.*

3 (Endorsed:)

U. S. MARSHAL'S OFFICE,
District of California.

I hereby specially depute Alfred P. Pike to serve and return the within writ.

San Francisco, April 14th, 1877.

E. P. MARSELLUS,
U. S. Marshal.

OFFICE OF THE U. S. MARSHAL,
District of California.

I hereby certify that I received the within subpœna on the 14th day of April, A. D. 1877, and served the same on the 14th day of April, A. D. 1877, on Faxon D. Atherton, said defendant, by leaving a certified copy thereof at the defendant's dwelling-house at San Mateo County, in said district, with Mrs. F. D. Atherton, an adult, who is a member of his family.

San Francisco, April 16th, 1877.

E. P. MARSELLUS,
U. S. Marshal,
By ALFRED P. PIKE,
Special Deputy.

4

Filed 16 April, 1877.

L. S. B. SAWYER, *Clerk,*
By J. F. O'BEIRNE, *Dep. Cl'k.*

5 *Bill of complaint.*

In the circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES OF AMERICA
vs.
FAXON D. ATHERTON.

To the honorable judge of the circuit court of the United States for the ninth circuit, district of California:

John M. Coghlan, United States attorney for the district of California, by direction of the hon. Attorney-General of the United States, in the name of the United States, brings this his bill of complaint, as well on behalf of the said United States as of the persons hereinafter named, settlers and pre-emptors upon the public lands of the United States hereinafter described, against Faxon D. Atherton, a resident of said district, and hereupon complains and says:

6 That on or about the 14th of August, 1852, Ygnacio Pastor, since deceased, by his attorneys, Jones, Tompkins, and Strode, presented to the board of commissioners for ascertaining and settling private land claims in the State of California, a petition in which said Pastor claimed a certain tract of land situated in Monterey County, California, known by the name of the Milpitas, and extending from the place known as the Rinconada de las Milpitas to that known as the Rinconada del Potrero, situated near the ex-mission of San Antonio, which, as alleged, was granted to the petitioner on the 5th day of May, 1838, by Don Juan Bautista Alvarado, claiming to be constitutional governor of the department of California, and presenting with said petition a copy of said pretended grant, and promising that the original would be presented and proved.

That thereafter such proceedings were had before the said board
7 of land commissioners that on the 6th day of December, 1853, the
said commissioners rendered a decree in said case confirming said pretended grant to said Ygnacio Pastor.

The decree of confirmation described the land as follows: "The land of which confirmation is made is situated near the mission of San Antonio, in Monterey County, and known by the name of 'Milpitas,' and is the same occupied by the said claimant; it being a valley surrounded by hills, and the land confirmed extending from the place known as the Rinconada de las Milpitas to that known as the Rinconada del Potrero, and bounded on the other external limits by the foot-hills enclosing said valley."

The mission of San Antonio, referred to in said decree, was located between the missions of San Miguel and La Soledad, about forty-five miles north of the former, and about thirty-five miles south of the latter,
the position and surrounding country being shown on the dia-
8 gram or map of the survey on which the patent hereinafter re-
ferred to was issued, a copy of which map is hereto attached.

The buildings of the said mission were mostly in township 22 south, range 7 east, of Mount Diablo meridian, and the lands once belonging to said mission are mostly in townships 21, 22, and 23 south, ranges 5, 6, and 7 east, of the Mount Diablo meridian.

At the date of the pretended grant to Ygnacio Pastor, and for years thereafter, the mission of San Antonio occupied and used the valley in which it was located, and was under the control of the Mexican Govern-

ment, in charge of officers in the employ and pay of the public, and said mission supported a large number of Indians or neophytes, and possessed large bands of cattle, sheep, horses, and other live stock, as well as other personal property, as will more fully appear by reference to the public records and documents in the office of the United States
9 surveyor-general for California, among which are—

The regulations of Governor Alvarado of January 17th, 1839.

The decree by the same governor of March 1st, 1840, prescribing new regulations and replacing the administrators of the missions (San Antonio included) by stewards or major-domos, and defining the powers of the latter and fixing their compensation.

The orders by Governor Michiltorena, March 29th, 1843, that certain missions (San Antonio included) be delivered up to the priests, to be managed by them as formerly.

The decree of the departmental assembly of May 28th, 1845, under which, by order of Governor Pico, October, 1845, certain missions were sold and others were rented, the government reserving to itself the right of taking care that these establishments prosper, and prevent their destruction or decline during the period of their renting.

Your orator further shows that the mission of San Antonio was
10 never disposed of in any manner, and the lands belonging to said mission at the time California was ceded to the United States had not been sold or disposed of by the Mexican government, but were public lands, and by virtue of the transfer of sovereignty became a part of the public domain of the United States.

That the papers constituting the pretended grant on which said claim before the board of land commissioners was founded, are the following, being translations and copies from the original Spanish, to wit:

M'T EXCEL'T S'OR GOVERNOR: Ignacio Pastor, neophyte, of the mission of San Antonio, before the respectable person of your excellency, represent that I am an Indian of this mission, and that I have behaved myself always like an honest man, whether in time of the priests or of the administrators; that I am weary of working, and wish my emancipation, with the favor that some animals may be given me, and a
11 small rancho, where I may freely establish myself and my family; said place is the Rinconada de las Mil pitas, as far as the Rinconada of the Potrero. Your excellency may inform yourself through the s'or administrator about my conduct, and grant my prayer if you deem it just, whereby I shall receive grace and favor.

Mission of San Antonio, 4th May, 1838.

YGNACIO PASTOR.

MISSION OF SAN ANTONIO,
4th May, 1838.

Let the administrator of this establishment report if the native representant has the necessary requisites, and all that he may deem proper to report.

ALVARADO.

M'T EXCELL'T S'OR GOVERNOR: According to the decree that Y. E. has given yesterday on the petition of the native, Ygnacio Pastor, of whom you have been pleased to ask of me a report, I will say that this individual is a person who in the community of this mission of San Antonio has always performed all sorts of work very honorably, deserving

the confidence of all the several individuals who have been employed in
this establishment by the government, and even previously by the
12 missionaries in charge of the administration of the temporalities.
Some other natives of the mission have been emancipated by the government, and favored with cattle, horses, and lands, notwithstanding their having less merits than the representant, and so I recommend it to Y. E.'s consideration, if you should find it according to justice.

Regarding the land which he solicits, it is of the places pertinent to this mission which is found entirely unoccupied. This is all I can report to Y. E., leaving to your sense of justice to do what shall appear to your superior pleasure.

San Antonio, 5th May, 1838.

J. D. JESUS PICO.

MISSION OF SAN ANTONIO,
May 5th, 1838.

In view of the solicitude of the party interested in this representation, of the report of the administrator in respect to the application of Ygnacio Pastor, neophyte, of this mission, and in consideration of all
that was stated and the merits of which he is accredited, I have
13 by these presents segregated him from said neophycy, conceding
him in property the place called the Milpitas, as he solicits.

The administrator of this mission shall establish him on said land and take care that he be maintained in quiet and peaceable possession, giving him at the same time fifty head of cattle, two yoke of oxen, and three horses out of the community. Thus I, Juan B. Alvarado, constitutional governor of the department of the Californias, ordered it and signed.

JUAN B. ALVARADO.

Said papers, constituting said pretended grant, were not among the public archives at the time of the transfer of sovereignty, nor at the date of said proceeding before the board of land commissioners, but were produced from private custody. That the Mexican archives in the custody of the
United States surveyor general in this State show and your orator
14 alleges the fact to be, that at the time the said pretended petition, order, and grant bear date said Alvarado was not constitutional governor or provisional or temporary governor, but that Carlos Antonio Corrillo was then, before, and some time after the lawful governor of California, and that Alvarado was not appointed constitutional governor till August, 1839, and that Alvarado was not at San Antonio Mission at the date of said pretended grant, nor for a long time before and subsequent thereto, but was some two hundred and fifty miles to the southward, in the vicinity of Los Angeles.

Your orator states, upon information and belief, that said pretended grant was fraudulently made, after the transfer of sovereignty, and the said papers fraudulently antedated by the parties to the same; and that said grant is not a grant by the Mexican government, or by its authority, or under or in pursuance of the laws of the same.

15 Your orator further shows that after the confirmation of said
claim by the board of land commissioners, to wit, August the 13th, 1855, a petition was filed in the U. S. district court for the southern district of California by the U. S. district attorney, on behalf of the United States, asking that the decree of said board of commissioners be reviewed by said court, which petition was accompanied by a transcript of the report of the board of commissioners and of the papers and evi-

dence on which it was founded, and fully and distinctly set forth the grounds on which the claim was founded, and fully and distinctly set forth the grounds on which the claim was alleged to be invalid. That the claimant appeared and answered, and such proceedings were thereupon had that on the 6th day of March, 1856, the said United States district court for the southern district of California rendered its 16 decision respecting said claim, and thereafter, on the 29th day of December, 1856, filed and entered its decree, in words and figures following, to wit:

This cause came on to be heard at a regular term of this court, on an appeal from the final decision of the commissioners to ascertain and settle private land claims in the State of California, under an act of Congress approved March 3d, 1851, upon the transcript of the proceedings and decision and the papers in evidence on which said decision was founded, and it appearing to the court that said transcript was duly filed, according to law, and counsel for the respective parties having been duly heard, it is ordered, adjudged, and decreed that the decision of said commissioners be and the same is hereby reversed, and that the claim of the appellee be and the same is hereby declared invalid and rejected.

ISAAC S. K. OGIER,
U. S. Dist. Judge for S. Dist. of Cal.

17 Which decree was duly recorded in the record book of decrees of said court, page 118. That, as appears from papers on file in said court, long before the rendition of said decree and before the presentation of said claim to the land commission, the title and interest of said Pastor in said pretended grant had been conveyed and transferred to said José de Jesus Pico, one of the parties concerned in manufacturing the papers on which said claim was founded, as hereinbefore appears; that after the rejection of said claim by the U. S. district court as aforesaid, the said Pico, being the owner of said claim, but knowing the fraudulent character of the same, as appears, abandoned the same and never afterwards took any steps to prosecute the case further, either by taking an appeal, or by motion, or petition for a new trial, or a rehearing.

Your orator further shows that over four years after the rejec- 18 tion of said claim by said U. S. district court and after the same had been so abandoned by said Pico, to wit, on the 30th day of June, 1860, one Juan Manuel Luco, by his solicitor, Isaac Hartman, filed in said court what he terms a petition for a bill of review, in which said petition, after referring to the action of the board of commissioners and the said court on said claim, proceeds as follows:

"Your petitioner is further informed and believes that the principal and only ground upon which the court rejected said claim was that the boundaries of said land and the extent thereof were not sufficiently defined, which said decision of this court petitioner avers is erroneous and ought to be reviewed and set aside, inasmuch as the decree aforesaid of said board of land commissioners should have been affirmed upon principles of law, as well as the proof in the case.

19 "Your petitioner further showeth that after the filing of the aforesaid petition before the board of land commissioners the said Ygnacio died; that before his death he sold and alienated all his right, title and interest in and to the land aforesaid; that your petitioner, by means of certain conveyances in writing, duly executed, acknowledged

and recorded by the said Ygnacio and his intermediate grantees, is seized and possessed of all the right and title of the said Ygnacio to the land aforesaid; and of all of which your petitioner is ready and willing to make proof as he may be directed." And he asks that the cause be reviewed in his name, and the former decision be set aside and the grant confirmed. That there is no allegation, statement, or claim by the said petitioner, Luco, or in his behalf, of any newly-discovered evidence or of any different or other evidence on the merits than what had already been heard by the court, but the allegation only that the previous
20 decision of the court was "erroneous, and ought to be reviewed and set aside."

That upon this petition and showing said U. S. district court assumed to review the case in the name of said Luco, and on the 31st day of August, 1860, entered an order vacating and setting aside the former decree rejecting said claim, and proceeded to affirm the decree of the board of land commissioners and confirm said grant, the land of which confirmation was thus made being stated to be that known as the "Milpitas," situated near the mission of San Antonio, in the county of Monterey, and the boundary of which is from the corner of the "Milpitas" to the corner of the Patrero, reference being had to the expediente for a fuller and more perfect description. Provided there be less quantity of land within said boundaries than eleven leagues, the confirmation is made of such less quantity.

And your orator charges that the action of said U. S. district
21 court for the southern district of California in the premises, in setting aside and vacating its former decree and confirming said claim, was irregular, and without authority of law, and that said former decree rejecting said claim had become final.

Your orator further shows that from all the papers and testimony in the case in support of said grant, before the board of land commissioners and the court, it appears that the Milpitas is a small valley to the northwest of the main valley in which the said Mission San Antonio is located, and separated from said main valley by spurs or hills, which close nearly together, leaving a gap where the stream passes through, and that said stream is so short in that the trail goes over the hills. At the upper or western end of this little valley there was a small garden where vegetables were raised for the Indians of the mission; hence the name of the valley and grant, the Milpitas, meaning little
22 garden. The said Pastor, in his petition to Alvarado, asks for a "small rancho," and says "said place is the Rinconada de las Milpitas, as far as the Rinconada of the Potrero," the latter being where the small valley is separated from the main valley, as shown in the map attached to this bill. The administrator of the mission, to whom the petition was referred, says of the land asked for, "it is of the places pertinent to this mission which is found entirely unoccupied," and Alvarado concedes to the petitioner the "place called the Milpitas, as he solicits."

The Milpitas did not include any of the larger valley below the spurs or hills referred to, but was confined entirely to the upper and smaller valley, "a valley in the hills," as some of the witnesses term it. In the petition of said Pastor, in presenting his claim to the board of commissioners, he describes his ranch as containing three square leagues. In his deed, in 1854, to José Jesus Pico, the same person, who as ad-
23 ministrator of the mission purports to have examined the premises when the grant was made and ought to know the quantity, the

ranch is stated as containing two square leagues, and is located near and northwest of the ex-mission of San Antonio.

The decree of the land commissioners says the land confirmed is known by the name of the Milpitas, "it being a valley surrounded by hills," and, in their opinion filed, the board say: "It appears to be a small, isolated valley, the limits of which, at either extremity, are defined in the petition, according to which the grant is made," and "the limits on the sides are the hills by which it is encompassed." The limits lengthwise, as defined in the petition for the grant, as above stated, are given as the Rinconada (or corner) of the Milpitas as far as the Rinconada (or corner) of the Potrero. The corner of the Milpitas is the upper or western end of the small valley, and the corner
24 of the Potrero is in or near the spurs or hills dividing said valley from the main valley in which the mission is located, as shown on the map attached. That neither the petition for the grant nor the grant itself, nor the decree of the court, or of the board of commissioners, extend the limits to the eastward beyond or into the Potrero, but only to the corner of the same.

That the area contained within said grant so confirmed embraces only about 12,000 acres, and would lie entirely to the westward or northwesterly of the corner of the Potrero, which itself is some distance to the northwest of the mission buildings and should properly lie entirely to the westward of the dotted line on the map hereto attached, running northwesterly from the point on said map, designated "Pine M. 13 and S. M. 13."

Your orator further shows that in May, 1866, a United States deputy surveyor made a survey of said rancho Milpitas, under an appointment and instructions from the United States surveyor-general
25 of California. That said instructions were based upon said final decree of the United States district court, and directed and required said deputy to convey and establish the boundaries of said grant in strict accordance with the decree of confirmation. That said deputy, in utter disregard of his instructions and of said decree, included in his survey not only the valley of the Milpitas, and the land confirmed by said decree to the grantee, but also the larger valley, in which the old mission is located, and embracing some 34,000 acres of the public lands of the United States, extending some miles to the southeastward and below the mission, and surrounding said mission building for miles on either side, as will be seen by reference to the map herewith. That instead of locating on his map of said survey the Rinconada del Potrero where the same is located on the ground, to wit, between said
26 mission buildings and the Milpitas Valley and on the trail between said places, said deputy fraudulently or by mistake placed it several miles northeasterly of the old mission buildings, at a point indicated on the map herewith as "old mission trail;" and, in addition to thus removing by erroneous location on his map or plat of survey the eastern extremity of said grant, to wit, the Rinconada del Potrero, some six or seven miles to the eastward of its true location on the ground, as the same was known at the time of, before, and since the date of said grant, said deputy, contrary to his said express directions, extended the limits of said grant by his said survey some eight miles still further in a southerly and southwesterly direction, so as to include the greater portion of the larger valley, as before stated, and as will be seen by reference to the map herewith.

That said survey when returned was, upon consideration, rejected by the surveyor general, and his opinion, on appeal to the Commis-

27 sioner of the General Land Office, was affirmed, and the Commissioner of the General Land Office, on the question coming before him a second time, and after full examination of the case and ascertaining the true and exact location of the land confirmed by said final decree, gave another opinion confining said rancho to the limits of the grant and final decree as aforesaid.

Thereafter said deputy surveyor, in accordance with the opinions of the surveyor-general and Commissioner of the General Land Office, segregated the lands confirmed by said final decree from the public lands of the United States, which had been erroneously included by his former survey as hereinbefore stated, and returned to the office of the surveyor-general a map and field-notes of the same. Said last survey included the land indicated on the map herewith lying westerly of the dotted line running northerly from the point indicated on said map by the 28 words and figures "Pine M. 13, and S. M. 13," which said survey and field notes were approved by the surveyor-general of California.

On said last map so returned by the said deputy surveyor, El Potrero is placed according to its true location on the ground, and as indicated on the map herewith. And your orator avers that this last survey includes all the Rancho Milpitas, and contains all the land confirmed to the grantee by the final decree, which, according to said last survey or segregation, embraces 12,291 acres.$\frac{2}{100}$

Your orator, upon information and belief, alleges that thereafter certain parties interested in said rancho Milpitas fraudulently conspired together and by false representations and suppressions of fact imposed upon the officers connected with the Land Office Department at Washington, and fraudulently procured a patent to be issued in the name of said Ygnacio Pastor for 43,280$\frac{90}{100}$ acres of land, being 30,939$\frac{88}{100}$ 29 acres more than was confirmed to the claimant by said final decree, and as segregated and surveyed under instructions from the Commissioner of the General Land Office as aforesaid; which said patent bears date the 16th day of February, 1875, and was sent to the surveyor-general of California, and by him delivered to the defendant, Faxon D. Atherton, through his attorney, Alex. B. Grogan, on the 10th day of May, 1875; and said defendant has since caused said patent to be recorded in the recorder's office of Monterey County. Said patent, so fraudulently issued, embraces nearly all the land first surveyed and returned by said deputy as aforesaid, and is shown on the map herewith. That within the limits of said patent, to the southeast of said Milpitas grant as confirmed, to wit, the tract embracing 30,989 $\frac{88}{100}$ acres, as indicated on the map herewith, there are a large number of persons who have settled as pre-emptors under the laws of the United States, 30 the names and dates of whose settlements, upon information and belief, are given as follows, to wit:

Wm. Orr	1869
Wm. Pitts	1869
F. J. Fivè	1874
Thos. N. Beasley	1867
C. Wright	1873
James Corn	1866
Frank Portugues	1870
Estefano Seraphine	1869
Jesus Carbajal	1860
Juan Renteria	1869
Antonio Laguna	1868

	Wm. Earl, jr.	1860
	José Ortega	1867
	Basili Gonzalez	1865
	Aureleano Gonzalez	1865
	Daniel Maloney	1869
	Julian Galbraith	1865
	Deroteo Ambris	1840
	Gabriel Indo	1866
	Juan Geijatva	1865
	Vincente Hidalgo	1854
	Miguel Mereno	1864
	Jesus Valencia	1855
	José N. Castro	1873
	Coldomiro Madero	1873
	Francisco Cosio	1868
31	J. W. Scott	1869
	A. J. Norwood	1872
	Vincente Avila	1860
	Jesus Hidalgo	1854
	George Holland	1868
	Juan Romero	1860
	Fred. Vischer	1870
	M. Nidiever	1871
	H. Lavison	
	F. Bidal	1871
	P. Moreno	1864
	R. Roblez	1866
	A. Forbes	1869
	Thos. Melton	1874
	Chas. Liddle	1870
	A. McPherson	1874
	John Beasley	1867
	Wm. J. Murray	1870
	Geo. Dutton	1873
	Manuel Silva	1868
	M. Portugues	1870
	Teodoro Roblez	1860
	P. G. Alm	1871
	Doleres Aldaco	1852
	Wm. Earl, sr.	1859
	E. Roblez	1867
	Maurice Gonzalez	1865
	Ventura Gonzalez	1865
	Silverio Alatorre	1865
	Julian Leon	1845
32	Marius Arguelly	1867
	Celestina Allatorre	1865
	Manuel Candelarie	1870
	Herculavo Soto	1855
	José Nunez	1868
	Juan Sanchez	1867
	Manuel Hurista	1867
	Narcisso Castro	1873
	Jesus Garcia	1873
	N. E. Adams	1860
	E. Kay	1869

Joseph Jarrett	1872
Juan Falque	1869
A. Castro	1873
D. Lewty	1868
H. C. Dodge	1872
W. McGregor	1874
J. M. Gill	1855
Antonio Eucinas	1871
J. Carbajal	1865
A. Martinez	1872
M. Rosas	1866
D. Valverde	1874
Henry Yound	1874
J. Swan	1870
F. Mereno	1868
Eusebio	1850
Vincento Linores	1863
N. Galindo	1876
J. M. Roblez	1876
33 W. E. Wright	1876
J. Stayton	1876
P. Stretch	1876
A. Manchester	1875
M. Snyder	1877
J. Cayetano	1876
C. Herbert	1876
J. Madrano	1876
Chas. Jackson	1870
James Quinn	1873
Jno. Forrest	1868
A. Robley	1876
J. Laguna	1876
John Dunlap	1877
B. Elliott	1876
P. Woolf	1876
A. Barker	1876
G. Place	1877
T. Tidball	1876
Jno. Doun	1876
R. Post	1877
M. Sadler	1876

Your orator, on information and belief, avers that said parties have severally made settlement and erected dwelling-houses, cultivated their respective claims, and in other respects, as far as they could, have 34 in good faith complied with the pre-emption laws of the United States, in order to entitle them to become pre-emptors of their respective claims as soon as said land, so wrongfully included in said patent, shall have been surveyed, sectionized, and become subject to entry. That after the said rancho had been segregated and confined to its proper boundaries, according to the grant of the Milpitas, and the decree of confirmation, as hereinbefore stated, said settlers in said larger valley had reason to suppose, and, as your orator is informed and believes, did suppose that they were settled upon the public lands of the United States, and entirely outside of said grant; and that those thereafter settling upon said larger tract outside of said segregated rancho had a right to suppose, and, as your orator is informed and believes, did suppose they were settling upon the public lands of the United States. That the land so occupied and settled upon is in townships 21 and 22 S., range 6 E., and townships 21, 22, and 23 S., range 7 E., 35 Mount Diablo meridian, and to the southeast of said line of segregation, and within the exterior limits of said first survey, as indicated on the map herewith. That the said defendant acquired the title from the former owners and claimants of said rancho before the issuing of said patent, and, as your orator is informed and believes, and so alleges the fact to be, with full knowledge and notice of the various fraudulent acts and doings, terminating in the issuing of said patent, as hereinbefore stated.

Your orator further shows that on the 21st day of June, 1875, the said defendant Atherton brought an action of ejectment in the district court of the twentieth judicial district of the State of California, for the county of Monterey, against said William Orr and the other settlers hereinbefore mentioned, then on said land, for the purpose of recovering the possession of the said lands so occupied and settled upon by them, claiming the same as a part of the rancho Milpitas under said 36 patent; and said action is founded entirely upon said patent. That thereafter such proceedings were had in such action that judgment was rendered in favor of said Atherton, the plaintiff therein, he holding the apparent legal title under such patent, and against such settlers, the defendants therein. That the said Orr and the other defendants in said action have taken an appeal from said judgment to the supreme court of the State of California, and the case is on the calendar of said court for this the April term thereof. That this defendant, Atherton, the plaintiff in said suit, is pressing said case to a hearing on said appeal, and threatens, if the judgment therein be affirmed, to summarily eject said settlers from their said possessions as aforesaid.

Wherefore your orator prays relief, and the decree of this court that said grant by said Alvarado to said Pastor was fraudulent and invalid, and that said confirmation thereof by the United States 37 district court for the southern district of California was irregular and invalid; that said grant and confirmation be annulled and set aside, and said patent recalled and cancelled, and that said defendant be forever estopped from asserting any title to said lands under said pretended grant or patent, and that the same be declared public lands of the United States.

Failing, for any cause, in obtaining the foregoing relief, your orator further prays the decree of this court that the survey of said Rancho Milpitas, including lands to the south and east of the Rinconado del Potrero, as the same is located on the ground between the old Mission of San Antonio and the Milpitas Valley, as hereinbefore mentioned and described, was false and fraudulent, and that the patent issued in pursuance thereof be revoked and canceled; and that the boundaries of said Rancho Milpitas be re-established and fixed according to 38 their true location as given by said segregation, field-notes, and map of said deputy surveyor, made in accordance with the opinions of the said Commissioner of the General Land Office; and that said defendant be forever estopped from asserting any title under said patent to any of said lands which are not included within the true boundaries of said Rancho Milpitas as aforesaid, and that the lands outside of such true boundaries be declared public lands of the United States; that the said defendant, his agents and attorneys, in the mean time be restrained and enjoined from prosecuting said action against said set-

tlers on said last-mentioned tract of land, now pending in the supreme court of this State on appeal, as aforesaid; and upon the final decree of this court herein, the said defendant be perpetually enjoined from prosecuting said action or from enforcing any judgment recovered therein;
and that the United States may have such other and further re-
39 lief in the premises as may seem to the court to accord with the
principles of equity.

May it please the court to grant to the United States the writ of subpœna issuing out of and under the seal of this honorable court, directed to said Faxon D. Atherton, commanding him, on a day certain to be named therein, to be and appear in this honorable court to answer all and singular the premises, and to stand to, abide by, and perform such other orders and directions and decrees as may be made herein.

JOHN M. COGHLAN,
United States Attorney.

(Endorsed:) Filed 13 April, 1877. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. cl'k.

41 *Demurrer.*

In the circuit court of the United States, ninth circuit, district of California.

UNITED STATES OF AMERICA
vs.
FAXON D. ATHERTON.

The defendant, by protestation, not confessing any of the matters and things in and by the bill of complaint of plaintiff in the above cause complained of to be true, in manner and form as the same are therein set forth, says that he is advised that there is no matter or thing in said bill good and sufficient in law to call this defendant to account, or to require him to answer in this court for the same, but that there is good cause of demurrer thereto; and he does demur to said bill accordingly, and for cause of demurrer sets forth:

42 First. That said bill, in case the same were true, contains no matter of equity wherein this court can ground any decree or give complainant any discovery or relief as against this defendant.

Second. That all the matters or things stated or set forth in said bill are of a political nature, and appertain to the political department of government, and are not within the cognizance or jurisdiction of any court of equity, or of any court of justice.

Third. That all the matters or things stated, charged, or set forth in said bill are of a political nature, and belong to the political department of government, and are not, nor are any of said matters or things, within the jurisdiction of a court of equity, and that without an act of Congress empowering them so to do, neither the district attorney nor the Attorney-General of the United States has any authority to file, or bring said bill of complaint.

43 Fourth. That by virtue of the laws of the United States in such case made and provided, the judgments and decrees of the tribunals mentioned in said bill of complaint, and the money and patent therein set forth, are final and conclusive.

Fifth. That said bill of complaint was not filed or brought within five years next after the pronouncing or enrollment of the decree of the United States district court in said bill set forth.

Sixth. That the alleged cause and causes of complaint set forth in said bill are all and each of the same stale and antiquated, and no sufficient reason or excuse is assigned or given by the complainant for the laches and delay in commencing said action.

44 Seventh. That the acquisition of the title of said lands in said bill mentioned, as made by this defendant, was made upon the faith of the final decrees and judgments of the courts mentioned in said bill, and which courts then had jurisdiction to render the same, and that the rights of this defendant thereunder cannot now be questioned.

Eighth. That no leave of this court to file said bill of complaint is shown.

Wherefore, and for divers other errors in said bill contained, and appearing on the face thereof, this defendant demurs thereto, and hereby prays the judgment of this court whether he is compellable or ought to make any answer thereto, otherwise than as aforesaid; and this defendant prays to be hence dismissed, with his costs and charges in this behalf sustained.

JOHN B. HARMON,
Solicitor for Defendant.

45 I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

P. G. GALPIN,
Of Counsel for Defendant.

The defendant, Faxon D. Atherton, being sick, and hence unable to make affidavit that the foregoing demurrer is not interposed for delay, such affidavit is hereby waived.

J. M. COGHLAN,
United States Att'y.

Due service of copy of foregoing answer admitted this 4th day of June, 1877.

J. M. COGHLAN.

(Endorsed:) Filed 4th day of June, 1877. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

46 *Enrollment.*

At a stated term of the circuit court of the United States of America for the district of California, held at the court rooms, in the city of San Francisco, on Monday, the 16th day of July, in the year of our Lord one thousand eight hundred and seventy-seven.

Present, the honorable Stephen J. Field, associate justice U. S. Supreme Court.

THE UNITED STATES OF AMERICA
vs.
FAXON D. ATHERTON.

The complainant filed its bill of complaint, which is hereto annexed, on the 13th day of April, 1877.

Thereupon a subpœna to appear herein was issued, directed to said defendant, returnable on the first Monday of May, A. D. 1877, and proper service thereof made upon said defendant prior to the 47 return day thereof. Said subpœna with the marshal's return of service thereon endorsed is hereto annexed. The defendant appeared herein by John B. Harmon, esq., as his solicitor, and T. G. Galpin, esq., counsel.

Defendant filed a demurrer to said bill of complaint on the 4th day of June, 1877, which demurrer is hereto annexed. Thereafter this cause came on to be heard upon said bill and demurrer, and after arguments of counsel, the matter having been submitted to the court for consideration and decision, a final decree was entered herein, in the words and figures following, to wit:

Decree.

At a stated term of the circuit court of the United States of America for the district of California, held at the court room, in the city of San Francisco, on Monday, the sixteenth day of July, in the year of our Lord one thousand eight hundred and seventy-seven.

48 Present, the honorable Stephen J. Field, associate justice Supreme Court.

THE UNITED STATES OF AMERICA
vs.
FAXON D. ATHERTON.
} In equity. No. 1754. Decree.

This cause coming on to be heard upon the demurrer of the defendant to the plaintiff's bill of complaint, and after hearing argument of counsel of the respective parties, and the court having duly considered the same, it is now ordered and decreed that the said demurrer be and the same is hereby sustained; and it further appearing to the court that the principal objections to the bill upon which the demurrer is sustained cannot be obviated by any amendments, it is further ordered and decreed that the said bill be and the same is hereby dismissed.

49 (Endorsed:) Filed and entered 16th July, 1877. L. S. B. Sawyer, clerk.

50 Whereupon said pleadings and final decree are hereto annexed, said decree being duly filed and enrolled pursuant to the practice of this court.

Attest, &c.

[SEAL.]

L. S. B. SAWYER,
Clerk,
By J. F. O'BEIRNE,
Deputy Clerk.

(Endorsed:) Enrolled papers. Filed 16th July, 1877. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

51 *Order granting appeal.*

At a stated term of the circuit court of the United States of America for the district of California, held at the court-room in the city of San Francisco, on Monday, the 16th day of July, in the year of our Lord one thousand eight hundred and seventy-seven.

Present, the honorable Stephen J. Field, associate justice of the Supreme Court of the United States.

UNITED STATES OF AMERICA
vs.
F. D. ATHERTON.

This cause coming on to be heard upon the demurrer to the bill of complaint herein, John B. Harmon, esq., appearing upon behalf of the said demurrer, and Walter Van Dyke, esq., in support of the bill herein, was argued and submitted to the court for consideration and decision. 52 And the court having duly considered the same, it is now ordered and decreed that said demurrer be and the same is hereby sustained; and it further appearing to the court that the principal objections to the bill upon which the demurrer is sustained cannot be obviated by any amendments, it is further ordered and decreed that said bill be and the same is hereby dismissed.

And thereupon the district attorney moves for leave to amend the bill without stating in what particulars, which motion is denied, the court stating as the reason of the denial that the principal ground on which the demurrer is sustained could not be obviated by amendment.

And thereupon the district attorney moves that an appeal be allowed to the Supreme Court from the decree, and it is accordingly allowed.

53 I, L. S. B. Sawyer, clerk of the circuit court of the United States for the district of California, do hereby certify that the foregoing pages, numbered from one to fifty-two inclusive, are a correct copy of the record and of all the proceedings in the therein entitled cause, and that the same together constitute the transcript on appeal to the United States Supreme Court in said cause.

Attest my hand seal of said circuit court this fifteenth day of September, A. D. 1877.

[SEAL.] L. S. B. SAWYER,
Clerk.

(Indorsement on cover:) No. 387. The United States, appellants, vs. Dominga G. de Atherton, executrix, and A. B. Grogan, executor of Faxon D. Atherton, deceased. California C. C. U. S. Filed 14th February, 1878.

Sixth. That the alleged cause and causes of complaint set forth in said bill are all and each of the same stale and antiquated, and no sufficient reason or excuse is assigned or given by the complainant for the laches and delay in commencing said action.

Seventh. That the acquisition of the title of said lands in said bill mentioned, as made by this defendant, was made upon the 44 faith of the final decrees and judgments of the courts mentioned in said bill, and which courts then had jurisdiction to render the same, and that the rights of this defendant thereunder cannot now be questioned.

Eighth. That no leave of this court to file said bill of complaint is shown.

Wherefore, and for divers other errors in said bill contained, and appearing on the face thereof, this defendant demurs thereto, and hereby prays the judgment of this court whether he is compellable or ought to make any answer thereto, otherwise than as aforesaid; and this defendant prays to be hence dismissed, with his costs and charges in this behalf sustained.

JOHN B. HARMON,
Solicitor for Defendant.

45 I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

P. G. GALPIN,
Of Counsel for Defendant.

The defendant, Faxon D. Atherton, being sick, and hence unable to make affidavit that the foregoing demurrer is not interposed for delay, such affidavit is hereby waived.

J. M. COGHLAN,
United States Att'y.

Due service of copy of foregoing answer admitted this 4th day of June, 1877.

J. M. COGHLAN.

(Endorsed:) Filed 4th day of June, 1877. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

46 *Enrollment.*

At a stated term of the circuit court of the United States of America for the district of California, held at the court rooms, in the city of San Francisco, on Monday, the 16th day of July, in the year of our Lord one thousand eight hundred and seventy-seven.

Present, the honorable Stephen J. Field, associate justice U. S. Supreme Court.

THE UNITED STATES OF AMERICA
vs.
FAXON D. ATHERTON.

The complainant filed its bill of complaint, which is hereto annexed, on the 13th day of April, 1877.

Thereupon a subpœna to appear herein was issued, directed to said defendant, returnable on the first Monday of May, A. D. 1877, and

47 proper service thereof made upon said defendant prior to the return day thereof. Said subpœna with the marshal's return of service thereon endorsed is hereto annexed. The defendant appeared herein by John B. Harmon, esq., as his solicitor, and T. G. Galpin, esq., counsel.

Defendant filed a demurrer to said bill of complaint on the 4th day of June, 1877, which demurrer is hereto annexed. Thereafter this cause came on to be heard upon said bill and demurrer, and after arguments of counsel, the matter having been submitted to the court for consideration and decision, a final decree was entered herein, in the words and figures following, to wit:

Decree.

At a stated term of the circuit court of the United States of America for the district of California, held at the court room, in the city of San Francisco, on Monday, the sixteenth day of July, in the year of our Lord one thousand eight hundred and seventy-seven.

48 Present, the honorable Stephen J. Field, associate justice Supreme Court.

THE UNITED STATES OF AMERICA
vs.
FAXON D. ATHERTON.
} In equity. No. 1754. Decree.

This cause coming on to be heard upon the demurrer of the defendant to the plaintiff's bill of complaint, and after hearing argument of counsel of the respective parties, and the court having duly considered the same, it is now ordered and decreed that the said demurrer be and the same is hereby sustained; and it further appearing to the court that the principal objections to the bill upon which the demurrer is sustained cannot be obviated by any amendments, it is further ordered and decreed that the said bill be and the same is hereby dismissed.

49 (Endorsed:) Filed and entered 16th July, 1877. L. S. B. Sawyer, clerk.

50 Whereupon said pleadings and final decree are hereto annexed, said decree being duly filed and enrolled pursuant to the practice of this court.

Attest, &c.

[SEAL.] L. S. B. SAWYER,
Clerk,
By J. F. O'BEIRNE,
Deputy Clerk.

(Endorsed:) Enrolled papers. Filed 16th July, 1877. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

51 *Order granting appeal.*

At a stated term of the circuit court of the United States of America for the district of California, held at the court-room in the city of San Francisco, on Monday, the 16th day of July, in the year of our Lord one thousand eight hundred and seventy-seven.

Present, the honorable Stephen J. Field, associate justice of the Supreme Court of the United States.

UNITED STATES OF AMERICA
vs.
F. D. ATHERTON.

This cause coming on to be heard upon the demurrer to the bill of complaint herein, John B. Harmon, esq., appearing upon behalf of the said demurrer, and Walter Van Dyke, esq., in support of the bill herein,
was argued and submitted to the court for consideration and de-
52 cision. And the court having duly considered the same, it is
now ordered and decreed that said demurrer be and the same is hereby sustained; and it further appearing to the court that the principal objections to the bill upon which the demurrer is sustained cannot be obviated by any amendments, it is further ordered and decreed that said bill be and the same is hereby dismissed.

And thereupon the district attorney moves for leave to amend the bill without stating in what particulars, which motion is denied, the court stating as the reason of the denial that the principal ground on which the demurrer is sustained could not be obviated by amendment.

And thereupon the district attorney moves that an appeal be allowed
to the Supreme Court from the decree, and it is accordingly allowed.

53 I, L. S. B. Sawyer, clerk of the circuit court of the United States
for the district of California, do hereby certify that the foregoing pages, numbered from one to fifty-two inclusive, are a correct copy of the record and of all the proceedings in the therein entitled cause, and that the same together constitute the transcript on appeal to the United States Supreme Court in said cause.

Attest my hand seal of said circuit court this fifteenth day of September, A. D. 1877.

[SEAL.] L. S. B. SAWYER,
Clerk.

(Indorsement on cover:) No. 387. The United States, appellants, vs. Dominga G. de Atherton, executrix, and A. B. Grogan, executor of Faxon D. Atherton, deceased. California C. C. U. S. Filed 14th February, 1878.

FILED
DEC 6 1880
JAMES H. McKENNEY, CLERK.

IN THE

Supreme Court of the United States.

October Term, 1880.

NO. 124.

THE UNITED STATES,
APPELLANT,

vs.

DOMINGA G. De ATHERTON, Executrix, and A. B. GROGAN, Executor of FAXON D. ATHERTON, deceased,
APPELLEES.

Appeal from the Circuit Court of the United States for the District of California.

Brief for Appellant.

WILLIAM J. JOHNSTON,
JAMES K. REDINGTON,
For Appellant.

WASHINGTON, D. C.
R. BERESFORD, PRINTER, 523 SEVENTH ST.
1880.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1880.

THE UNITED STATES, *Appellant*, *vs.* DOMINGA G. DE ATHERTON, *Executrix*, *and* A. B. GROGAN, *Executor of* FAXON D. ATHERTON, *deceased*, *Appellees.*	No. 124.

Appeal from the Circuit Court of the United States for the District of California.

BRIEF FOR APPELLANT.

STATEMENT.

On the 13th day of April, 1877, the then United States Attorney for California, by direction of the Attorney General of the United States, and in the name of the United States, filed in the Circuit Court for the District of California, a bill in equity against Faxon D. Atherton. The fact that such bill was filed by direction of the Attorney General " as well on behalf of the United States" as the persons thereinafter named, is set forth in the bill itself. The bill alleges, in substance, that in August, 1852, one Ygnacio Pastor, presented to the Board of Commissioners for ascertaining and settling private land claims in California, a petition for confirmation of a certain alleged grant to him in 1838, by Alvarado, claiming to be then Mexican Governor of California; that upon consideration thereof, the board confirmed said claim, describing it as the land known as "Milpitas," occupied by claimant, a valley surrounded by hills extending from Rinconada de las Milpitas, to Rinconada del Protrero, and bounded on the other external limits by the foot hills enclosing said valley; that thereafter by petition filed in the United States District Court, and in the manner pointed out by law, said proceedings were reviewed by said District Court, and that on the 6th day of March, 1856, said court reversed the said decision of the Board of Commissioners, and rejected the claim. The bill further alleges that the papers upon which said confirmation was sought were not found among the public archives, but were produced to the board from private custody; that at the date when said grant purported to have been made, said Alvarado was not Governor of California; that Carlos Antonio Carrillo was then such Governor and so continued until August, 1839; that said grant was fraudulently made after the change of flag and antedated, and that the same was not a valid grant by the Mexican Government. It is still further alleged that the land covered by said fraudulent grant, was, at the date thereof and for several years afterwards, in possession of the Government itself, and appropriated to other uses.

The bill still further alleges that over four years after the rejection of said pretended grant, viz: on the 30th day of June, 1860, one Juan Manuel Luco, claiming to have succeeded to the title of said Pastor, filed in the said District Court, what is termed a petition for bill of review, in which petition, after referring to the action of the Board of Commissioners and the District Court, as hereinbefore set forth, proceeds as follows: "Your petitioner is informed and be-

" lieves that the principal and only ground upon which the " court rejected said claim, was that the boundaries of said " land and the extent thereof were not sufficiently defined, " which said decision of the court petitioner avers is erron-" eous and ought to be reviewed and set aside, inasmuch as " the decree aforesaid of said Board of Land Commissioners " should have been affirmed upon principles of law, as well " as the proofs in the case;" that there was contained in said petition no averment of any newly discovered evidence, or of any other or different evidence than what had already been heard by the court; that thereupon said court assumed to review said case, and entered an order on the 3d day of August, 1860, vacating said prior decree and proceeded to affirm the decree of the said Board of Commissioners and confirm said grant for the land known as "Milpitas," situated near the mission of San Antonio in the county of Monterey, the boundaries of the same being from the corner of Milpitas to the corner of the Protrero, with a reference to the expediente for further description.

The bill still further alleges that the tract of land confirmed in the first instance by the board and afterwards by the second decree of the District Court, was a small valley surrounded by hills known as "Milpitas," extending from the corner (Rinconada) of "Milpitas" to the corner of the Protrero, and bounded on the sides by the foot hills, containing about 12,000 acres. The entire tract so confirmed is shown on a map accompanying the bill, being that portion lying northwest of the dotted line running northerly from a post marked "M. 13 and S. M. 13." That in May, 1866, an official survey was made of said grant by a deputy surveyor, which included not only all of the premises above described, but also some 34,000 acres of the public land lying outside of said confirmation and to the southeast of said dotted line on the map; that this survey was for this reason rejected by the Surveyor General, whose action in that regard, was, upon appeal, affirmed by the Commissioner of the General Land Office; that said Commissioner upon full examination ascertained the proper location of said land, and directed that the claim be confirmed to the smaller tract above described; that thereupon in execution of such decision, a corrected survey was returned which segregated from the public land, in satisfaction of said grant the land lying northwest of said dotted line upon the map, and that this survey included all the land confirmed to the grantee by said second decree of the District Court.

The bill still further alleges that thereafter "certain par-
" ties interested in said rancho Milpitas fraudulently con-
" spired together, and by false representations and suppres-
" sion of fact imposed upon the officers connected with the
" Land Office Department at Washington, and fraudulently
" procured a patent to be issued in the name of said Ygnacio
" Pastor, for $43,280\frac{90}{100}$ acres of land being $30,939\frac{88}{100}$ acres
" more than was confirmed to the claimant by said final de-
" cree, and as segregated and surveyed under instructions from
" the Commissioner of the General Land Office, as afore-
" said; which said patent bears date the 16th day of Febru-
" ary, 1875, and was sent to the Surveyor General of Cali-
" fornia, and by him delivered to the defendant, Faxon D.
" Atherton, through his attorney, Alexander B. Grogan, on
" the 10th day of May, 1875, and said defendant has since
" caused said patent to be recorded in the recorder's office of
" Monterey County. Said patent so fraudulently issued
" embraces nearly all the land first surveyed and returned
" by said deputy as aforesaid and as shown on the map here-
" with."

The relief prayed for is, first, that the said grant be declared to be invalid and fraudulent; that the confirmation thereof be declared irregular and invalid; that the patent be recalled and cancelled, and that defendant be forever estopped from asserting any title under said grant or patent: second, that failing, for any reason, to obtain the foregoing relief, that the survey of said grant be declared false and fraudulent, and the patent issued in pursuance thereof be revoked and cancelled; that the boundaries of said grant be re-established and fixed according to their true location, as above set forth; and that defendant be forever estopped to assert any title under said patent to any lands not within such true boundaries of the grant and confirmation.

A demurrer was filed to the bill of complaint, which, upon hearing, was sustained by the court, whereupon appeal was moved and allowed, and the case now comes before the court for review.

ASSIGNMENT OF ERRORS.

1. The bill alleges, with sufficient precision, that the patent issued to the defendant was fraudulently procured from the Land Department by misrepresentation and suppression of facts. The Circuit Court erred in not overruling the demurrer on this ground.

2. The District Court had no power or jurisdiction upon the so-called bill of review to set aside its prior decree rejecting the grant—it had no jurisdiction to entertain a bill of this character. Its action thereon was, therefore, absolutely void, and of no effect. The bill in the case at bar properly alleges the facts upon which this conclusion is founded, and the Circuit Court erred in not overruling the demurrer on that ground.

I.

The general doctrine, that fraud vitiates the most solemn contracts, documents and judgments, is too well settled to admit of question, and the allegation contained in the bill, "that parties interested in said rancho Milpitas fraudulently "conspired together, and by false representations and sup-"pressions of fact, imposed upon the officers connected with "the Land Office Department at Washington, and fraudulent-"ly procured a patent to be issued in the name of said Ygnacio "Pastor, for 30,939$\frac{88}{100}$ acres more than was confirmed to "claimant by said final decree," constitutes such a specific allegation of fraud as creates a direct issue sufficient to justify the interposition of a court of equity, for the purpose of instituting an inquiry into the alleged facts of such suppression and misrepresentation, and as places defendant upon his notice.

Any fraudulent concealment or suppression of facts, by which a party is deprived of his defense, is just ground for equitable relief; and if the officers of the Land Department have been imposed upon and misled by such concealment and misrepresentation, and in consequence thereof have granted a title which they would not have granted had the facts concealed been known to them, then equity will set it aside.

"If the title to property has been acquired through fraud, "equity will grant relief by undoing what has been done, "and placing the title where it was before."

Gorham *v.* Gilson, 28 Cal., 479.

"In case of fraud in obtaining judgment the party "aggrieved must proceed by a bill to impeach the original "decree for fraud."

Robb *v.* Robb, 6 Cal., 21.
Carpentier *v.* Hart, 5 Cal., 406.

Equity may be invoked "if, by reason of something done "by the successful party to a suit, there was, in fact, no "adverse trial or decision of the issue in the case, where the "unsuccessful party has been prevented from exhibiting "fully his case by fraud or deception practiced on him by "his opponent, as by keeping him away from court, a false "compromise, or where defendant had no knowledge of the "suit, being kept in ignorance by the acts of the plaintiff; "or where an attorney fraudulently, and without authority, "assumes to represent a party, and connives at his defeat; "or where the attorney regularly employed corruptly sells "out his client's interest to the other side."

United States *v.* Throckmorton, 8 Otto, 61.
Wells on Res Adjudicata, § 499.

The use of fraudulent devices renders void the judgment of the highest court, and to justfy the interposition of a court of equity to set aside such fraudulent judgment it is only necessary to allege such specific act of fraud in the proper manner.

This has been done in this bill. The specific act of fraud alleged consists in misrepresentation and suppression of facts. This fraud is alleged to have been perpetrated by the claimant or parties interested with him, and its object and effect was to impose upon the officers connected with the Land Office Department at Washington, while the case was there under adjudication.

The allegations of the bill set forth the parties to the fraud, the specific act of fraud, the time and place, when and where perpetrated, and its effect upon the judgment rendered. It is such a fraud as intervened in the proceedings by which the judgment was obtained.

Story's Eq., §§ 251, 1851, 1852.

" When a party knowingly misrepresents material facts, " the law will not permit him to derive any benefit from the " transaction."

Alvaraz *v.* Brannon, 7 Cal., 503.

II.

The District Court rejected the claim of the petitioner on the 6th day of March, 1856, and on the 29th day of December, 1856, the decree was rendered and the term expired. More than four years after such rejection, viz : June 30, 1860, this decree is attempted to be vacated and set aside, in a proceeding commenced by filing in the same court what is called " a petition for a bill of review." This petition or bill does not allege any newly discovered evidence, but expressly proceeds upon the theory that the court had committed an error in the previous decision of the case upon its merits, and that that error could be corrected in a proceeding of this character. We submit that the court had no power or jurisdiction to entertain such a petition or bill or take action upon it, and that its decree thereon was absolutely void.

What was the paper in question? Was it a petition for rehearing, a bill in the nature of a bill of review, or a bill of review? Except by appeal these were the only methods by which an error in the prior decree could be rectified. We claim that it did not contain the requisites of either of these petitions, that it was a paper which upon its face was utterly inappropriate and inadequate for the purpose contemplated, and that the court had no jurisdiction to grant any relief upon it.

We suppose the so-called "petition for bill of review" was relied upon as a bill of review—it clearly could have had no efficacy as a petition for rehearing, for the term had expired; nor as a bill in the nature of a bill of review, for such a bill can only be filed before enrollment of the decree, according to the English practice, or before the decree had become matter of record, according to the practice of our courts.

Story, Eq. Pleadings, § 421.
Standish *v.* Radley, 2 Atk., 178.
Wiser *v.* Blachly, 2 Johns., Ch. 488.
Perry *v.* Phillips, 17 Ves., 478.

After enrollment of the decree or after it had become matter of record under our practice, the only remedy was by bill of review, and that was the proper remedy.

Story Eq. Pleadings, § 403.
Dexter *v.* Arnold, 5 Mason, 303, 310.
Whiting *v.* Bank of U. S., 13 Peters, 6, 13.

But, except upon newly discovered evidence, a bill of review can only be filed to correct an error of law *apparent on the face of the decree*, or, in our practice, on the *face of the decree and pleadings* and resort can never be had to the evidence to show error in the decree.

Perry *v.* Phillips, 17 Ves., 178.
Coombs *v.* Proud, 1 Ch. Cas., 54.
Trulock *v.* Robey, 15 Simons, 277.
Mellish *v.* Williams, 1 Vern, 166.
O'Brien *v.* Connor, 2 Ball & Beatt., 146.
Webb *v.* Pell, 3 Paige, 368.
Evans *v.* Clements, 14 Ill., 206.

Dexter *v.* Arnold, 5 Mason, 310.
Hollingsworth *v.* McDonald, 2 Harr. & John., 230.
Whiting *v.* Bank of U. S., 13 Peters, 6, 13, 14.

The so-called bill of review shows upon its face that an annulment of the prior decree is not sought for error of law apparent on the face of the record, but for errors of judgment in finding the facts from the evidence. In other words, the bill of review is invoked instead of the proper remedy by appeal.

The record before the court on a bill of review would have been the petition of the United States Attorney, the answer of the claimant, and the decree of the court.

Act of Mch. 3, 1851, sec. 9, 9 Stat., 632.
Act of Aug. 31, 1852, sec. 12, 10 Stat., 99.
Transcript in case at bar, pp. 4, 5.

The bill does not pretend to aver that any errors were apparent on the face of this record.

So, too, in a bill of review it is necessary to state the former bill and proceedings thereon, the decree, and the point in which the party exhibiting the bill of review conceives himself aggrieved by it, and the *ground of law*, or matter upon which he asks to impeach it.

Story Equity Pl., § 420.
Mitford Equity Pl., §§ 88, 89.
Cooper Equity Pl., § 95.

The bill in the case at bar does not set out *any ground of law* whatever for the vacation of the prior decree.

The District Court is a court of limited jurisdiction, exercising only such powers as are conferred upon it by statute. The presumption is, therefore, against all jurisdiction not specially shown in the proceedings. It is for this reason that proceedings before it are required to show upon their face that jurisdiction exists. Any proceeding directly attacking the decree of the court on the ground of jurisdiction will be effective, if, upon the face of the prior record, it appears that the court had, in fact and law, no jurisdiction.

The bill of review is in the nature of an *original* proceeding.

Story Eq. Pl., § 16.
Milford Eq. Pl., § 35.
Cooper Eq. Pl., §§ 44, 62.

And the bill itself, filed in the United States District Court, must show the jurisdiction of the court. The bill filed in the case at bar not only does not allege such facts as give the court jurisdiction, but does contain such averments as show that the court had no jurisdiction. The bill would have been demurrable on that ground. The court proceeded entirely without jurisdiction, and this being shown in a direct proceeding, the decree entered must be declared to have been void, and of no validity.

Respectfully submitted,

WILLIAM J. JOHNSTON,
JAMES K. REDINGTON,
For Appellant.